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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWIN MENJIVAR,

Defendant and Appellant.

A124566

(Contra Costa County
Super. Ct. No. 05-081130-7)

Edwin Menjivar (appellant) was convicted, following a jury trial, of assault with a deadly weapon and by force likely to produce great bodily injury. On appeal, he contends defense counsel was ineffective for failing to present an eyewitness identification expert at trial. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On October 8, 2008, appellant was charged by information with assault by both deadly weapon and force likely to produce great bodily injury. (Pen. Code, 245, subd. (a)(1).) The information further alleged that appellant had personally inflicted great bodily injury on the victim, Brian Soto. (Pen. Code, § 12022.7, subd. (a).)

On February 5, 2008, a jury convicted appellant as charged.

On March 27, 2009, the trial court placed appellant on probation for three years with the condition that he serve one year in county jail.

On April 3, 2009, appellant filed a notice of appeal.

FACTUAL BACKGROUND

Prosecution Case

Brian Soto testified that between 11:00 p.m. and midnight on May 25, 2008, he and his girlfriend, Justine Donovan, walked from Donovan's home to a nearby convenience store in Pittsburg. As they were walking back to Donovan's home, a pickup truck with two men inside pulled up and the men started saying things to Donovan like, "Hey, mama . . . [y]ou want to go for a ride? Come on, mama. Get in the truck." Soto heard both men saying things, and saw the passenger leaning out of the truck's window. Soto became annoyed at the repeated comments and told the men to "[g]et the fuck out of here." When the men stayed and continued talking to Donovan, Soto, who was shocked and angry that they had not left, walked towards the truck, figuring they would then drive away. Donovan repeatedly told Soto to stop.

After Soto walked to within a few feet of the truck, he and the passenger stared at each other for a couple of seconds.¹ The driver then got out of the truck and Soto "figured I was about to get in a fight with the two of them." He was surprised and "kind of got a sick feeling" in his stomach because he had not really been in any fights before. He got a "fast glimpse" of the driver's face when he came around the back of the truck toward Soto. It probably took the driver about four seconds to get out of the truck and come around to where Soto was standing. Soto was not watching the driver the entire time because he was also keeping an eye on the passenger door since he expected the passenger to get out of the truck as well. Soto probably saw the driver's face for a second.²

¹ Soto was near the passenger's door and could "really only see the passenger," and "really didn't get a great view of the driver." Soto described the lighting at the scene as "decent."

² Soto explained, "I turned around and I saw, you know, the driver stab me. I didn't get the clearest view of his face. The passenger is the person I felt like I got the best view of during the whole incident."

As the driver came around the truck, Soto saw a knife in his hand. The driver then lunged forward and Soto felt a punch. He looked down and realized he had been stabbed. Neither the driver nor the passenger said anything as this occurred. Donovan started walking towards the truck and Soto, who felt “kind of in shock,” said, “He just stabbed me.” Soto was stabbed on the right side of his abdomen and, although he was not sure, he believed the driver held the knife in his left hand. Donovan began yelling at the men to get out of there and saying she was going to call the police. Soto moved between her and the driver because he was worried about her getting involved. The driver then quickly got back into the truck and sped off.

Soto called 911 on his cell phone. Donovan had gotten the truck’s license plate number, which they gave to the dispatcher. Police officers arrived quickly, but it took 15 to 20 minutes for an ambulance to arrive. Blood kept “dumping out” of the wound and, once the ambulance arrived, Soto believed he was in shock and panicking.³ Before that, he recalled telling police that both men were wearing “K-mart” type western wear shirts and jeans and that the driver’s jeans were gray. Soto remembered identifying the driver as bald, but did not recall saying he was clean-shaven. At trial, he recalled the driver as having a goatee. He recalled telling the officer at the scene that the passenger had a shaved head and a broad nose. He, was not sure, but thought he said that the passenger was “pretty clean-shaven.” He also described the passenger as a Hispanic male in his 30’s.

While still at the scene, Soto was shown a photograph of three men on an iPhone and he identified the man standing in the middle back of the photo as the passenger. At trial he explained: His nose was “pretty distinct to me, and that’s who I felt like I was face-to-face with, was the passenger.” He was not sure enough to say whether either of the other men in the photo was the person who stabbed him. It could have been either one, but he thought it more likely it was the man on the right. Soto testified, “I’m not

³ Soto testified that the pain from the stabbing lasted for two months because the wound got infected. He gained 60 pounds in the months after the stabbing and still felt some discomfort in his stomach when bending over.

sure which guy stabbed me, you know, but I believe the defendant was the passenger. If I got a clear view of anybody I thought it was the passenger.” He believed this is what he told police on the night of the stabbing.

At trial, Soto identified appellant as the passenger of the truck. He did not believe appellant was the person who stabbed him. Some weeks after the incident, a detective showed Soto a series of six photographs and, while he did not identify the driver who had stabbed him, he identified the person in one of them as the passenger. The detective said there was some confusion because Soto had identified that person as the driver on the night of the incident. Soto disagreed and said he had identified him as the passenger then, too. He asked for a live lineup, but found out that was not possible because the person he had identified as the passenger was not in custody at that point.

Soto had also identified appellant as the passenger when he testified at the preliminary hearing. He was surprised that appellant had been accused of stabbing him. When he walked into the courtroom, he was thinking, “like, man, you got the wrong guy up there, is what I felt.”

Soto acknowledged having told the prosecutor that his memory of the incident was hazy due to the passage of time and his being in shock after the incident. Given all of the details he missed and his inability to answer all of the questions about the incident, he doubted his own memory. At trial, after the prosecutor showed him the police report of the incident, which stated that he had identified appellant as the driver who had stabbed him, Soto said he was “70 to 80 percent sure” that appellant was the passenger and also said that Donovan “would say she’s 100 percent sure the other way.” When the prosecutor asked if it was possible that appellant’s face was actually the last face he saw after being stabbed, Soto said, “it’s possible, but I don’t believe it was. I really do believe he was the passenger.” Soto believed this because he remembered the nose and face and believed appellant was the person he approached at the window of the truck.

Soto also acknowledged on cross-examination that, at the preliminary hearing, he said he was 100 percent sure that appellant was the passenger. He said that seeing the police report that said he identified appellant as the person who stabbed him made him

doubt himself. However, he still believed he had identified appellant as the passenger and that the officer misunderstood. It also made him doubt himself that he could not identify the person who stabbed him, although he was face-to-face with the passenger and never got a good look at the driver.

Soto further testified that he felt guilt about the incident. He “felt guilt even standing there stabbed, because I felt like I pushed something I shouldn’t have pushed, even though, you know, they shouldn’t have done that. [¶] I shouldn’t have approached, you know, and I wouldn’t want to cause anybody to go to jail for a stupid mistake.” He said he could be wrong in his identification “just due to everything, you know, everybody else’s view of what I said and what was seen, but I still feel like he was the passenger.” He did have concerns about putting an innocent person in prison, and also said he was not mad at the person who stabbed him due to a “stupid mistake.” Soto nevertheless insisted, “I’m not trying to cover for that man. I believe I am telling the truth that he was the passenger. I’m not trying to get him off, you know, just because I could put him in jail. I think he was the passenger.”

Justine Donovan, Brian Soto’s girlfriend, testified that the area where Soto was stabbed was very well lit with streetlights. As the men in the truck made cat calls, Soto approached the truck and told them to leave. They did not leave, and Donovan could see that Soto was having a conversation with the passenger through the open truck window, although she could not hear what they were saying. Soto and the passenger were face-to-face for about five seconds. When the driver exited the truck, he walked very fast toward Soto, and Donovan was able to see the side of his face for two or three seconds. She could not say what the driver was wearing. Soto did not turn to look at the driver until the last moment as he approached; Soto was more focused on the passenger. Donovan did not look closely at the passenger, but saw the side of his face while he and Soto were communicating.

Donovan saw a knife in the driver’s right hand before he “dipped down” and stabbed Soto in his gut. Soto then turned toward her and said, “He stabbed me.” Donovan walked closer to the truck, looked at the license plate, and told the driver to

leave because she was calling the police. The driver turned and looked at her from about five to six feet away; he appeared to be confused or frightened. She got a good look at his face at that point. She identified appellant at trial as the driver, saying she recognized his “hair, hairline, the shape of his face, the slant of his eyes, his nose.”⁴

About half an hour after the stabbing, a police officer took Donovan to a nearby apartment complex to see if she could identify a suspect. She saw the truck in the parking lot as they drove in. Three men were brought outside and lined up about 22 feet away from where she was sitting in a police car. She identified one man as the person who had stabbed Soto, based on his hair, his slanted eyes, his height, and his weight, although he appeared to have changed his pants and had no shirt on. That man was appellant. She also told the officer that one of the other men might have been the passenger.

Donovan had no doubt in her mind that appellant was the person who had stabbed Soto.

On cross-examination, Donovan testified that she had no idea what the driver was wearing. She had been guessing when she told an officer at the scene that she thought he was wearing tan pants. She was not sure when she described the driver at the scene if he was Hispanic or “some kind of oriental” or both. He had a shaved head with dark hair. She was able to see that the passenger had dark hair and a big nose, and could tell that he was Hispanic.

Given that she was panicked, Donovan may have mistakenly told an officer at the scene that the driver had the knife in his left hand, “but I know that it was the right because I could see it in his hand.” When shown a transcript from the preliminary hearing, Donovan acknowledged that she had testified that she believed the assailant had held the knife in his left hand when he stabbed Soto, but she did not remember that testimony. At trial, she was certain that the knife was in his right hand. She thought she

⁴ When Donovan and Soto came to the courthouse for the preliminary hearing, Donovan saw appellant waiting in line outside and pointed him out to Soto.

might have accidentally said left hand, but also knew she had said that it was the arm closest to her, which was the right. When defense counsel showed her the transcript from the preliminary hearing, where she had said that she did not see the knife in the driver's hand until it came out "because it was on the other side of him," in his left hand, she said she did not recall that testimony.

Donovan then testified that she was sure the knife was in the driver's right hand. When counsel asked if she was as sure about that as about it being appellant who was carrying the knife, Donovan responded that she was less sure, given that she apparently had twice before said the knife was in his left hand.

Finally, Donovan said that she had testified at the preliminary hearing that the driver "had facial hair in the goatee area." She did not recall telling an officer at the scene that he was clean-shaven, but instead recalled telling him there was "somewhat of a goatee."

Officer Scott Blazer testified that early in the morning of May 25, 2008 [*sic*], he was dispatched to an address at an apartment complex, which corresponded to the vehicle registration for the license plate number given by Donovan. He found the truck in the parking lot in front of the apartment. It was warm to the touch. There were three people inside the apartment who possibly matched the description of the person who stabbed Soto. Blazer took a photograph of them as well as the truck on his iPhone to show to the victim, who was being attended to by paramedics at the scene of the stabbing.

Blazer then drove to the scene and contacted Soto, who was lying on a gurney in the back of the ambulance. Soto seemed lucid during their interaction. Blazer first gave Soto the standard in-field admonition before showing him two photographs of the truck found in the parking lot. Soto said it was the same truck. Blazer then showed Soto the photograph of the three men, and Soto said that the two people in front "were not there." He then said that the person in back "looks like the guy, but the guy has a stronger nose." Soto could not explain what he meant when he said a "stronger nose." Blazer had a sense that Soto was trying to communicate something to him that he was not understanding. When he wrote down what Soto told him, it was his interpretation of what Soto had said.

Soto never said anything to Blazer about the person in the middle of the photograph being the passenger in the truck. He merely said, “it looks like the guy.” Blazer did not ask what guy he meant. Blazer did not take notes or record his exchange with Soto. He also acknowledged that it was loud in the back of the ambulance, Soto was in distress, and two medics were examining, working on, and talking to Soto during their interaction.

Pedro Cardoza testified that appellant was a close friend of the family and had grown up on Cardoza’s father’s farm in another country. Appellant had been living with him, his wife, and two children in Pittsburgh for the past year. Cardoza’s brother had lived there also, but had moved out about six months before trial. Cardoza owned the truck used in the stabbing. He used it primarily for business. He had given appellant permission to use the truck a couple of times when he needed appellant to run an errand for him. He kept the keys on a hook in the kitchen.

On May 25, 2008, Cardoza had gone to sleep at about 9:00 p.m. The police came to the apartment at about 1:00 a.m. and asked him where he had gone in his truck. He told them he had been sleeping. Cardoza did not give appellant permission to use his truck that night.

Cardoza, his brother, and appellant participated in a lineup that same night, after which appellant was arrested. The following week, Cardoza picked appellant up from jail. Cardoza’s wife, his children, and two other people were with them in his truck.

At trial Cardoza initially denied that appellant had said anything about the night in question, but then acknowledged previously having told the prosecutor that appellant had said he had gotten into a fight.⁵ Cardoza did not know if appellant was driving or was in the passenger seat that night. He assumed appellant was driving because he had the keys. He did not remember telling the prosecutor that appellant said he was driving, but he did say that appellant had said that he saw a couple arguing and that the truck stopped in

⁵ On cross-examination, Cardoza testified that he believed appellant said, “We got into a fight,” but it was possible that he said, “I got into a fight.”

front of the couple. He did not remember telling the prosecutor and did not recall appellant saying that he stopped the car in front of the couple and got out of the car. Appellant said these things to the people he was talking to in the back of the truck on the way home from jail.

Cardoza, who described appellant as a “good kid,” considered appellant a member of the family. He cared about him and felt protective of him in some ways.

Pittsburg Police Officer Daniel Buck testified that he was called to the scene of the stabbing and spoke to Soto shortly before the ambulance arrived. Soto was bleeding from the abdomen. He was visibly shaken and upset, but was coherent. Soto said that the driver of the vehicle was the person who had stabbed him. He described that person as a Hispanic male in his 30’s who was five feet eight inches tall; with an average build, a bald head, and clean shaven; and wearing a light blue long sleeved shirt. Soto also said the man held the knife in his left hand when he stabbed him. Buck then took a statement from Donovan, who was also very shaken and upset, but appeared coherent. He took her to view three men as possible suspects and she immediately identified appellant as the person who stabbed Soto, stating she was positive that it was him.

Louise Donovan (no relation to Justine), a crime scene investigator with the Pittsburg Police Department, testified that appellant’s thumb print was found on the truck’s rear view mirror and two of his fingerprints were found on the outside rear passenger side door.

Pittsburg Police Officer Cory Smith testified that, at about 2:30 a.m., shortly after he was arrested, appellant waived his *Miranda*⁶ rights and agreed to give a statement to police through an interpreter. During the interview, appellant showed no objective signs of intoxication. He said that he had gone to a party in Bay Point at about 6:00 p.m. the night before and that his friend Evelyn had given him a ride home at around 9:00 p.m. He said he drank three beers at the party and did not drive because he had been drinking. He also said he had just gone to sleep when the police arrived at his apartment. He said

⁶ *Miranda v. Arizona* (1966) 384 U.S. 436.

that he had neither driven nor been a passenger in the truck that night, and was not present at the scene of the stabbing. Appellant appeared calm throughout the interview; his demeanor did not change when he was told a witness had identified him as the person who had stabbed Soto.

Defense Case

A sample of appellant's blood was drawn at 2:16 a.m. on the morning following the stabbing. An analysis of that sample indicated that he had a .09 blood alcohol level. An hour earlier, he would have had a blood alcohol level of about .10. At that level, his ability to drive a car would have been impaired, although he may not have shown any outward symptoms of impairment.

DISCUSSION

Appellant contends defense counsel was ineffective for failing to present an eyewitness identification expert at trial. According to appellant, because the case hinged on which of the two eyewitnesses—victim Brian Soto or his girlfriend, Justine Donovan—the jury believed, defense counsel should have called an expert to explain “the unreliability and vagaries” of eyewitness identification. In particular, appellant argues that an expert was needed to discuss the facts that both witnesses had an insubstantial opportunity for observation, that both were under a great deal of stress when they made their identifications, that Donovan's cross-racial identification was potentially problematic, and that Donovan's certainty of her identification did not make it more likely to be accurate.

To prove ineffective assistance of counsel, a defendant must show that “counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In addition, the defendant must affirmatively establish prejudice by showing “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.)

The California Supreme Court has concluded that, where defense counsel's strategic reasons for challenged decisions do not appear in the record, reversal for ineffective assistance of counsel is warranted only when "there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

Appellant relies on *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*), overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, in support of his claim that calling an eyewitness expert to testify for the defense was essential in this case. In *McDonald*, the only evidence linking the defendant to the crime was equivocal eyewitness identifications; the defendant also had a strong alibi defense. (*McDonald*, at pp. 375-376.) The California Supreme Court stated: "[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion; . . . 'we do not intend to "open the gates" to a flood of expert evidence on the subject.' [Citation.] We expect that such evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter. Yet deference is not abdication. When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*Id.* at p. 377, fn. omitted.)

Here, we agree with appellant that this was a close case and that the competing eyewitness identifications were crucial factors in the jury's decision-making.⁷ We do not agree, however, with appellant's conclusion that, therefore, under *McDonald*, counsel's representation was inadequate. On the contrary, counsel quite reasonably could have

⁷ That said, there was also some corroborating evidence, most notably Cardoza's testimony regarding overhearing appellant talking about getting into a fight on the night in question.

determined that presenting expert testimony on the question of the reliability of eyewitness identification was a double-edged sword that potentially would have undermined Soto's identification of appellant as the passenger at least as much as Donovan's identification of him as the assailant. (See *People v. Weaver*, *supra*, 26 Cal.4th at p. 926; cf. *Brown v. Terhune* (N.D.Cal. 2001) 158 F.Supp.2d 1050, 1071 [counsel's "decision not to call an expert in the field of eyewitness identification was a tactical one that fell within the range of reasonable choices"].)

Indeed, two of the factors that can affect the reliability of eyewitness identification that were present here and that appellant claims required expert interpretation—insubstantial opportunity for observation and stress—were factors for both witnesses, arguably more so for Soto than for Donovan.⁸ Moreover, since *McDonald* was decided in 1984, results of scores of studies have been inconsistent regarding the relationship between “identification accuracy and confidence.” (See II Ziskin, *Coping with Psychiatric and Psychological Testimony* (5th ed. 1995) p. 1284 (II Ziskin).) Thus, whether through cross-examination of a defense expert or by calling his own expert, the prosecutor could have bolstered Donovan's identification and/or raised at least as many questions about the reliability of Soto's identification of appellant as the passenger as counsel's direct examination of a defense expert might raise about the reliability of Donovan's identification of him as the assailant. (See II Ziskin, at p. 1289 [“It is obvious from this review that, depending on the research paradigm employed, widely varying conclusions can be drawn about specific eyewitness factors”]; see also *People v. Wright* (1988) 45 Cal.3d 1126, 1142, fn. 13 [“The scientific studies on the psychological factors affecting eyewitness identifications are sufficiently experimental and open to debate that most [other] courts are still reluctant to approve even the admission of expert testimony on the subject”]; *People v. Johnson* (1993) 19 Cal.App.4th 778, 787-788 [“More recent

⁸ Soto testified that he was focused on the knife and did not get a good look at his assailant's face during the short time they were near each other. It also stands to reason that he was under even more stress than was Donovan, given that he was the one directly involved in the confrontation and stabbing.

cases and commentaries [after *McDonald*] have taken a rather more skeptical and jaundiced view of the likelihood that a parade of paid expert witnesses, using the courtroom for lectures on abstruse psychological or social theories, will truly assist the trier of fact”].)

Here, defense counsel effectively used cross-examination and closing argument to question the accuracy of Donovan’s identification. For example, counsel extensively cross-examined Donovan regarding her prior statement to police and testimony at the preliminary hearing that the assailant held the knife in his left hand, while at trial she had testified that she was certain that he had held the knife in his right hand. Donovan later admitted she was no longer absolutely certain of this, given her apparent prior inconsistent statement and testimony. Counsel discussed this inconsistency during her closing argument, using Donovan’s undermined certainty about the knife to cast doubt on Donovan’s absolute confidence that appellant was the assailant.⁹

In addition, the court instructed with CALCRIM No. 315, which discusses some of the factors that can affect eyewitness identification, as follows: “You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. In evaluating identification testimony, consider the follow [*sic*] questions:

“Did the witness know or have contact with the defendant before the event; How well could the witness see the perpetrator; What were the circumstances affecting the witness’s ability to observe, such as lighting, weather conditions, obstructions, distance and duration of observation; How closely was the witness paying attention; Was the witness under stress when he or she made the observation; Did the witness give a description and how does that description compare to the defendant; How much time passed between the event and the time when the witness identified the defendant; Was the

⁹ At one point, for example, while discussing the phenomenon of false certainty, counsel said, “Just seems Ms. Donovan was absolutely certain that the guy . . . with the knife had it in his right hand, but she was wrong. False certainty. It happens all the time.”

witness asked to pick the perpetrator out of a group; Did the witness ever fail to identify the defendant; Did the witness ever change his or her mind about the identification; How certain was the witness when he or she made an identification; Are the witness and the defendant of different races; Was the witness able to identify other participants in the crime; Was the witness able to identify the defendant in a photographic or physical lineup; Were there any other circumstances affecting the witness's ability to make an accurate identification?"¹⁰

Both the prosecutor and defense counsel discussed CALCRIM No. 315 at length during closing arguments, explaining how Soto and Donovan's identifications were stronger or weaker in light of the factors listed in the instruction. For example, the prosecutor acknowledged that Donovan was under stress at the time of the stabbing, but argued that it did not compare with the extreme stress Soto must have experienced. In addition, he stated that the period of time during which Soto viewed the passenger was equal or less to the time during which Donovan viewed the driver. The prosecutor also acknowledged that Donovan's identification of appellant was cross-racial, but noted that she lived in a diverse community. Finally, the prosecutor emphasized Donovan's unwavering identification of appellant as the driver, compared with Soto's 75 to 85 percent certainty that appellant was the passenger and his doubt about his memory of that night.

¹⁰ Appellant complains that CALCRIM No. 315 does not explain the vagaries of eyewitness identification, such as the danger of false certainty. Our Supreme Court, however, has explained that such an instruction "should *not* take a position as to the *impact* of each of the psychological factors listed. . . . An instruction that 'explained' the influence of the various psychological factors would of necessity adopt the views of certain experts and incorporate the results of certain psychological studies while discounting others. It would require the trial judge to endorse, and require the jury to follow, a particular psychological theory relating to the reliability of eyewitness identifications. Such an instruction would improperly invade the domain of the jury, and confuse the roles of expert witnesses and the judge." (*People v. Wright, supra*, 45 Cal.3d at p. 1141.)

Defense counsel, on the other hand, utilized the factors affecting eyewitness identification set forth in CALCRIM No. 315 to argue that Soto's identification of appellant as the passenger was more reliable than Donovan's identification of him as the driver. In particular, counsel focused on the phenomenon of false certainty, something "that occurs all the time. We hear about it in the news. It's pretty common." Counsel then discussed cases in which witnesses' certainty that a defendant had committed a crime led to conviction, only to have the defendant later exonerated by DNA evidence. Counsel explained how such false confidence can occur, using everyday, commonsense examples to make her point. She then contrasted Donovan's certainty with Soto's willingness to acknowledge that it is possible to make mistakes in such a stressful situation, which counsel averred made him more believable.¹¹

Counsel also discussed the amount of stress Donovan was under and the effect such stress could have had on her ability to process what the assailant looked like. Counsel argued, moreover, that the fact that Donovan only saw the driver's face for about two seconds must have affected her ability to later identify him accurately. Finally, counsel mentioned the well-known problem of cross-racial identification, and how it played out here, with Donovan unsure whether the driver was Hispanic or Asian.

Thus, both attorneys fully utilized closing argument to offer their positions on how both the evidence and the court's instruction on factors affecting eyewitness testimony demonstrated the greater reliability of one of the two witnesses. Their arguments make plain that the factors at issue here could be argued both ways, in terms of whether Soto's or Donovan's testimony was more reliable. As the prosecutor aptly stated in his final closing argument, "Now, [defense counsel] talked a lot about Ms. Donovan's testimony [and] about false positives and stressers [*sic*], and it struck me that all that analysis of what Ms. Donovan says is secretly applicable to Brian Soto. It cuts both ways. So it's

¹¹ As previously noted, counsel also effectively used Donovan's mistaken certainty about what hand the assailant used to stab Soto to cast doubt on her certainty about appellant being the driver, rather than the passenger.

either, yeah, I consider all this stuff from Ms. Donovan but not Mr. Soto because Mr. Soto says whatever of my client.”¹²

In sum, given the lack of consistency of opinion in the area of eyewitness identification (see *II Ziskin*, at p. 1289), and the problems with Soto’s identification that could also be highlighted by a counter-expert or on cross-examination, it is not apparent that expert testimony would have been more helpful to the defense case than to that of the prosecution. We therefore do not believe that defense counsel’s tactical choice to use cross-examination and closing argument, rather than an expert, to attempt to undermine Justine Donovan’s identification of appellant as the assailant, and to thereby strengthen Brian Soto’s identification, was unreasonable in the circumstances of this case. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 688; *People v. Weaver*, *supra*, 26 Cal.4th at p. 926.)

In addition, given defense counsel’s extensive cross-examination of Justine Donovan regarding the accuracy and reliability of her identification and counsel’s closing argument in which she used the court’s instruction (CALCRIM No. 315) to discuss the pitfalls of eyewitness identification as applied to Donovan’s testimony, it is not reasonably probable that, but for counsel’s failure to call an expert, the result of the trial would have been different. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

Accordingly, we conclude that appellant’s claim of ineffective assistance of counsel is without merit.

DISPOSITION

The judgment is affirmed.

¹² The prosecutor also told the jury, “You also have to consider the fact that you haven’t heard testimony, any expert testimony testifying that either Brian or Justine is being affected in this way [referring to stressors and false positives].”

Kline, P.J.

We concur:

Haerle, J.

Richman, J.

A124566, *People v. Menjivar*